IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

I.T.R. No. 57 of 1995

DATE OF DECISION: December , 2007

The Commissioner of Income-tax, Amritsar

…Applicant

Versus

M/s Kartar Singh & Co. (P) Ltd., Ferozepur Cantt.

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Sanjiv Bansal, Advocate,
for the applicant-revenue.

Mr. Sanjay Bansal, Senior Advocate, with
Mr. Parvesh Saini, Advocate,
for the respondent-assessee.

M.M. KUMAR, J.

This order shall dispose of I.T.R. Nos. 57 of 1995 and 97 of 1998 as common question of law is involved. However, the facts are being referred from I.T.R. No. 57 of 1995.

At the instance of the revenue the Income-tax Appellate Tribunal, Amritsar Bench, Amritsar (for brevity, 'the Tribunal'), while exercising jurisdiction under Section 256(1) of the Income-tax Act, 1961 (for brevity, 'the Act'), has referred the following question of law, which is claimed to have arisen from order dated 12.4.1994, passed in I.T.A. No. 527(ASR)/1993, in respect of assessment year 1989-90:-

"Whether on the facts and in the circumstances of the case, the Tribunal is right in cancelling the order u/s 263 passed by the Commissioner of Income-tax on 10.3.1993 ignoring the provisions of section 143 of the Income-tax Act relating to the assessment procedure?"

The assessee is a Private Limited Company and deriving income from contract work. It had filed its return on 4.10.1990 declaring income of Rs. 35,470/-. As per the statement of case, the assessment was completed by the Assessing Officer under Section 143(1)(a) of the Act on 12.12.1990. Subsequently, the Commissioner of Income-tax noticed that the assessee was not maintaining day-to-day record of consumption of raw material and work in progress etc. He, therefore, observed that the provisions of Section 145(1) of the Act were attracted in the case of the assessee and the income was liable to be computed by applying the net profit rate of 10% on the total receipts without allowing further deduction on account of expenses or depreciation etc. The CIT, Jalandhar, exercised his revisional jurisdiction under Section 263 of the Act and after affording opportunity of being heard to the assessee, vide order dated 10.3.1993, held that the assessment framed on 12.12.1990 under Section 143(1) of the Act was erroneous and prejudicial to the interest of the revenue. He accordingly cancelled the same directing the Assessing Officer to frame fresh assessment after applying net profit rate of 10% on contract receipts without allowing further deduction on account of depreciation or other expenses.

The assessee assailed the order dated 10.3.1993 of the CIT before the Tribunal in appeal. The Tribunal vide order dated 12.3.1994, allowed the appeal filed by the assessee, holding that the order passed by the CIT was without jurisdiction and invalid. It has been observed by the Tribunal that the order passed by the Assessing Officer under Section 143(1) of the Act, being a statutory order, was required to be served upon the assessee to become effective and since it was not served, the CIT could not exercise jurisdiction under section 263 of the Act in cancelling the alleged order passed under Section 143(1) on 12.12.1990. The Tribunal has also observed that if the order under Section 143(1) of the Act was not a statutory order but was only an intimation then the CIT could not exercise jurisdiction under Section 263 of the Act because the jurisdiction under Section 263 of the Act can be exercised only in relation to an 'order' passed by the Assessing Officer and not in relation to an 'intimation'.

Mr. Sanjiv Bansal, learned counsel for the revenue has supported the order passed by the Commissioner in exercise of jurisdiction under Section 263 of the Act and has argued that on proper reading of Section 263, the distinction between 'order' and 'intimation' as sought to be highlighted by the Tribunal pales into insignificance. According to the learned counsel, Section 263 of the Act is widely worded and it would encompass any order passed by the Assessing Officer, which includes a summary order of assessment. The expression 'any order' is not qualified and restricted to the regular assessment. Learned counsel has insisted that the only

requirement of Section 263 of the Act is that the proceedings before the Assessing Officer must be prejudicial to the interest of the revenue and any conclusion in the form of order or otherwise must be erroneous. He has further submitted that in any case an order made in the proceedings without even attempting to assess the income would still be an order made in the assessment proceedings, inasmuch as, the intimation that a certain amount is found due and payable by the assessee or the assessee was entitled to return of certain amount paid as tax would definitely be an order under which the tax demand is qualified or the amount of the tax to be determined. In such a case, no further proceedings would be necessary and the return is to be accepted under Section 143(1)(a) of the Act. The issuance of intimation also partake the character of a decision, inasmuch as, the return filed is accepted and no amount of tax is recoverable or refundable or vice versa. According to the learned counsel, such an intimation and acknowledgement are definitely an order. Mr. Sanjiv Bansal, learned counsel for the revenue wanted us to read the expression 'order' used in Section 263 of the Act dis-injunctively to the expression 'proceedings' so as to conclude that the expression 'order' would take into its view even an 'intimation' sent under Section 143(1)(a) of the Act. In support of his submission, learned counsel has placed reliance on various judgments, namely, **Commissioner of Income Tax v. Anderson Marine and Sons Pvt. Ltd., (2004) 266 ITR 694 (Bom.); Commissioner of Income Tax v. Smt. R.G. Umaranee, (2003) 262 ITR 507 (Mad.); Commissioner of Income Tax v. Chidambaram Construction Co., (2003) 261**

ITR 754 (Mad.); and **Commissioner of Income Tax v. Rajkumar Dipchand Phade, (2001) 249 ITR 520 (Bom.).**

Mr. Sanjay Bansal, learned senior counsel for the assessee, however, has argued that an intimation under Section 143(1) cannot be construed as an order of assessment and the pre-requisite condition for exercising revisional jurisdiction would not be satisfied as envisaged by Section 263 of the Act. According to learned counsel, two circumstances must co-exist to enable a Commissioner to exercise power of revision, namely, (i) the order must be erroneous; and (ii) it must be prejudicial to the interest of the revenue. In the absence of these two ingredients in a given case, it would not be legally permissible for the Commissioner to initiate revisional proceedings under section 263 of the Act. The absence of expression 'intimation' and/or 'order' in Section 263 of the Act by the legislature leads to an irresistible inference that power of revision could only be exercised in respect of an 'order' and not an 'intimation'. Elaborating his argument, learned counsel has pointed out the distinction between the 'order' and 'intimation' by referring to the provisions of Section 143(1)(a) and Section 154 of the Act. He has emphasised that power of rectification under Section 154 could be exercised in respect of an intimation, which is relatable to intimation and an order of assessment, as is evident from a bare perusal of the provisions of Section 154 of the Act. According to learned counsel, the intention of the legislature by omitting the expression 'intimation' from Section 263 of the Act becomes evident where it has preferred to use the word 'order' because the legislature never intended the power of revision to

be exercised in case of 'intimation' alone. He has further submitted that the expression 'order' has not been defined under the Act and so have not been expression 'erroneous'. He has also highlighted that Section 263 of the Act contemplates that an order sought to be revised by the Commissioner should have been passed in any proceedings under the Act. The expression 'proceedings' has also not been defined. Learned counsel has pointed out that the word 'order' in common parlance means – 'a direction or command at the instance of an Authority, Court or Tribunal'. It is formal expression of adjudication resulting in a decision at the hands of an Assessing Officer. According to Shorter Oxford dictionary, the word 'proceeding' means 'the formal manner in which legal proceedings are conducted'. Likewise, in the Blacks Law Dictionary (with pronunciations) Sixth Edition, the expression 'proceeding' has been defined to mean 'any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorised by law) in which, pursuant to law, testimony can be compelled to be given'. If there is no proceeding then there cannot be any order. He has insisted that once there is no order then the act of issuing intimation must be construed merely a ministerial act because it does not precede from any proceedings culminating into passing an order. He has then submitted that the principle of *'contemporanea expositio'* must be applied and this Court must hold that power of revision cannot be exercised in respect of an intimation. According to learned counsel, the rule of construction by reference to

'contemporanea expositio' is a well established rule for interpreting a provision of a statute by reference to the exposition it has received from an authority whose duty it has been to construe, execute and apply it. He has pointed out that the circulars issued by the Central Board of Direct Taxes (for brevity, 'the CBDT'), quite apart from their binding character, are clearly in the nature of *'contemporanea expositio'* furnishing legitimate aid in the construction of a provision of the act. In that regard, he has made reference to circulars issued prior to 1.4.1989 and argued that had it been the intention of legislature to empower the Commissioner with the power of revision in respect of intimation, necessary changes in Section 263 of the Act by way of an amendment would have been made and/or the CBDT would have withdrawn the earlier circulars. He has emphasised that the position of law as per the understanding of the officers of the Department/Revenue, thus, continues to be the same as reflected in the circulars. In that regard he has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **K.P. Varghese v. ITO, (1981) 131 ITR 597 (SC) at page 612**. He has also placed reliance on the judgments of Allahabad and Gujarat High Courts in the case of **CIT v. Smt. Brij Bala, (2005) 274 ITR 33 (All.)** and **CIT v. Vikrant Crimpers, (2006) 282 ITR 503 (Guj.)** and argued that after the findings have been recorded by the aforementioned two judgments, the revenue has issued circular with stipulation that no remedial action warranted in summary cases under Section 263 of the Act. Besides this, the learned counsel has placed reliance on the judgments rendered in the cases of **CIT v. Punjab National Bank, (2001) 249**

ITR 763 (Del); Hiltop Holdings India Ltd. v. CIT, (2005) 278 ITR 501 (Cal); and S.R. Koshti v. CIT, (2005) 276 ITR 165 (Guj) to urge that an intimation is not an order of assessment and, thus, not amenable to provisions of Section 263 of the Act. On the basis of his submission, learned counsel has submitted that the view taken by the Bombay High Court in the cases of Anderson Marine & Sons Pvt. Ltd. (supra) and Rajkumar Dipchand Phade (supra) as well as that of Madras High Court in the cases of Smt. R.G. Umaranee (supra) and Chidambaram Construction Co. (supra), is not correct view on principles and precedents.

We have thoughtfully considered the submissions made by the learned counsel for the parties and are of the view that the question of law referred for our opinion has to be answered in favour of the assessee and against the revenue. We are of the considered view that the omission of expression 'intimation' from section 263 of the Act establishes the intention of the Parliament to limit the power of revision of a Commissioner of Income Tax only to cases where an order has been passed. A plain reading of Section 263 of the Act would alone be sufficient to reach the aforementioned conclusion. A perusal of Section 263 of the Act brings out that the legislature never intended to clothe the Commissioner with the powers of revision in summary cases where intimation and acknowledgement had been sent to the assessee after filing of the return. In that regard reliance may be placed on a recent judgment of Hon'ble the Supreme Court in the case of **Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd., (2007) 291 ITR 500**. Two expressions

'assessment' and 'intimation' have been interpreted by their Lordships' as used in Section 143(1)(a) of the Act. The aforementioned exposition of law has flowed from the amendment substituting the word 'intimation' for assessment with effect from 1.6.1999. The view of Hon'ble the Supreme Court in that regard reads as under:-

> " One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is pre-served and is not taken away. Between the period from April 1, 1989, and March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between

April 1, 1998, and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word “intimation” as substituted for “assessment” that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143 (1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1) (a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Expla-nation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994 and May

31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions “intimation” and “assessment order” have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes “the computation of income”, sometimes “the determination of the amount of tax payable” and some-times “the whole procedure laid down in the Act for imposing liability upon the tax payer”. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(1)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the Departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J.) in Apogee International Limited v. Union of

India [1996] 220 ITR 248 (Delhi). It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them ? The reply is an emphatic "no". The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."

In view of the above, the question of law posed is answered against the revenue and in favour of the assessee. Accordingly, the order of the Tribunal is upheld.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

December , 2007
Pkapoor

“ Under the scheme of section 143(1) of the Income-tax Act, 1961, as substituted with effect from April 1, 1989, and prior to its substitution with effect from June 1, 1999, what were permissible to be adjusted under the first proviso to section 143(1)(a) were: (i) only apparent arithmetical errors in the return, accounts or documents accompanying the return, (ii) loss carried forward, deduction, allowance or relief, which was prima facie admissible on the basis of information available in the return but not claimed in the return, and similarly (iii) those claims which were, on the basis of the information available in the return, prima facie inadmissible, and were to be rectified/allowed/dis-allowed. What was permissible was correction of errors apparent on the basis of the documents accompanying the return. The Assessing Officer had no authority to make adjustments or adjudicate upon any debatable issues. In other words, the Assessing Officer had no power to go behind the return, accounts and documents, either in allowing or in disallowing deductions, allowance or relief. Though technically the intimation issued was deemed to be a demand notice under section 156, that did not preclude the right of the Assessing Officer to proceed under section 143(2): that right is preserved and not taken away.

With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted. During the period between April 1, 1998, and May 31, 1999, sending of an intimation was mandatory. The legislative intent is very clear from the use of the word "intimation" as substituted for "assessment" that two different concepts emerge. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a) no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The intimation under section 143(1)(a) cannot be treated to be an order of assessment.

Under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgement of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgement is not done by any Assessing Officer, but mostly by ministerial staff. It cannot therefore be said that an "assessment" is done by them. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156 for the apparent purpose of making machinery provisions relating to

recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. Nothing more can be inferred from the deeming provisions. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion does not arise."